IN THE

Supreme Court of the United States

October Term, 1977

No. 77-19

IN RE BOSTON & PROVIDENCE
RAILROAD CORPORATION,
Debtor,

ARMISTEAD B. ROOD,
Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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July 2, 1977

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Armistead Buckner Rood of Washington, D.C., respectfully prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the First Circuit in its docket No. 76-1370 captioned as above, which is embodied in a series of five orders entered between November 5, 1976, and February 24, 1977, inclusive.

OPINIONS BELOW

The district court did not enter an opinion. The summary memoranda and orders of the Court of Appeals were entered without a formal opinion. The order of the district court and the memoranda and orders of the Court of Appeals are all appended.

JURISDICTION

The judgment of the Court of Appeals is spread over five serial summary memoranda and orders respectively dated November 5 and December 10, 1976, and January 17, February 2, and February 24, 1977. The Court of Appeals did not pass upon all of petitioner's contentions now in question until its order of February 24, 1977, when it refused to consider his contentions of entrapment and denial of procedural due process. ("Moreover, upon review of the motion, no good reason appears . . .")

To avoid controversy over the time for a certiorari petition, the petitioner requested the Supreme Court to fix (or extend, if it were deemed an extension) the time as 90 days from February 24 until May 25, which was done by an order dated April 20. (No. A-861, Brennan, J.) By order of May 18 (Brennan, J.) the time was extended through June, 16. On June 16 the petitioner filed an application for a further extension of time through July 24, 1977. By an order of June 20 (Brennan, J.) that application was granted, without prejudice to the Court's consideration of whether the application of June 16 was filed on time. That order is appended.

Jurisdiction of the Supreme Court to review the judgment of the Court of Appeals rests on Title 28, U.S. Code, Section 1254(1).

QUESTIONS PRESENTED

In 1976 a simple order instructing the court's trustee to distribute an expense fund to the junior claimant, not mentioning the objections thereto, was entered in the district court. The petitioner, who held pending prior claims against the fund, is one of five parties who appealed. The Court of Appeals by order of November 5, 1976, dismissed petitioner's appeal summarily for lack of a substantial question, on the ground that all claims for further allowances from the fund were barred by a previous 1974 district court judgment which should have been appealed. It is not controverted that by agreement petitioner's pending claims lay in abeyance in the district court and that the supposition of a 1974 judgment on his claims had no factual basis whatsoever.

(1) Thereafter, to sustain its summary dismissal, might the Court of Appeals, after partly recanting (to allow future adjudication of some inchoate claims against the fund) persist (in its order of January 17, 1977) in summary dismissal by shifting to a second unargued ground, *viz.*, that petitioner, by not having appealed from the *lack* of a judgment ("failure to allow his allegedly pending petitions") had thereby waived his claims – in the face of Civil Rules 54(b) and 58?

(2) Upon its being shown that there was no previous order of the district court upon petitioner's claim from which he could have appealed, might the Court of Appeals then reaffirm its summary dismissal in an order of February 2, reject the pleading making that showing, and return it to petitioner, on the new stated grounds (a) that petitioner had not anticipatorily made that showing previous to the first order of the Court of Appeals (dated November 5, 1976), and (b) that no injustice was being

done – thus adhering to summary dismissal of the appeal at the threshold on considerations in which fanciful untimeliness was still a major element?

(3) Did the Court's summary dismissal adopted *sua sponte* on grounds that were new and therefore unargued, without allowing an opportunity to refute them, coupled with the Court's initial seminal error of postulating the existence of a fictitious appealable 1974 order (the error which set the series of dismissal orders in motion), amount to a deprivation of procedural due process [by requiring petitioner to disabuse the Court of Appeals of all possible misapprehensions before they could possibly come to his notice for correction], thus permitting rationalization of a disposition reached on untenable grounds?

(4) Did the Court of Appeals issue summary judgment without ascertaining what facts were established?

(5) Did the Court of Appeals, instead of setting a good example, act unaccountably and irresponsibly and beneath the standards exacted of administrative agencies upon judicial review in baring their reasoning and the ultimate bases of their dispositions?

(6) Did the procedures of the Court of Appeals satisfy minimum procedural decencies? Or did they penalize and afflict petitioner and visit forfeiture upon him for the Court's own mistakes in (a) first assuming that the appeal could be dismissed because he had not taken an appeal from an imaginary 1974 order, rather than for any blameworthy conduct on his part, (b) then assuming that he could have appealed from other orders which had not mentioned him (and to which he had no objection), and (c) then concluding that no injustice had been done by the surprising turn of events which dismissed his appeal because

he did not anticipatorily meet unforeseeable objections to his appeal before the reasoning of even the very first order of dismissal could have come to his consciousness?

CIVIL RULE 58
ENTRY OF JUDGMENT

> . . . Every judgment shall be set forth on a separate document. A judgment is effective only when entered as provided in Rule 79(a). . . .

STATEMENT OF THE CASE

The district court's jurisdiction is grounded on Section 77 of the Bankruptcy Act (11 U.S.C. 205), which reformed and codified procedures for reorganization of railroad carriers in equity. But this petition does not ask the Supreme Court to pass upon any question of railroad reorganization law.

In April, 1976, the Penn Central Transportation Company trustees transferred their railroad system generally to another railroad carrier known as Conrail. Simultaneously a Penn Central attorney asked the district court to instruct its B&P trustee to turn over the B&P reorganization expense fund to the Penn Central trustees.

Background

The Boston & Providence Railroad Corporation (B&P) has one of the new-style railroad reorganization plans that divide consummation into two stages, the first stage being sale of the debtor's transportation enterprise to another carrier. *Stage One* was accomplished for B&P on April 20, 1971. At that time the B&P expense fund in question was reserved for the payment of all allowances which the district court shall finally have adjudicated for expenses (including compensation) of

> "services heretofore or hereafter rendered . . . in connection with these proceedings or the Plan or the execution of this [consummation] order".

Subject to the priority of all such B&P allowances (in which the Interstate Commerce Commission is no longer involved) the B&P plan allocates the residue of the fund to Penn Central's trustees.

The major event in Stage One was the purchase of B&P's Boston & Providence Railroad (including accessory properties lying within the crowded modern metropolitan areas of Providence and Boston) and franchises by Penn Central's trustees as their new investment of 1971. The Boston & Providence Railroad (which now forms the east end of the so-called Northeast Corridor) had not been a part of Penn Central Transportation Company's estate in reorganization.

That 1971 purchase, however, was subject to a reserved equitable trust which petitioner had obtained for the benefit of all B&P owners, consisting of an equitable charge upon all B&P properties entitling B&P's stockholders to receive possible large proceeds of subsequent conversions of B&P real estate to modern metropolitan uses (by sale, condemnation, or lease) over a term of years.

Stage Two is the program to realize such proceeds for the B&P stockholders from that equitable trust. The trust and their interest (unless extended for extraordinary circumstances) will terminate at the end of 1978.

The B&P plan would not have been consummated without the addition of Stage Two. Originally the plan specified purchase of B&P's enterprise for a price that would allow B&P's stockholders $110 per share. Only the independent Development Group of B&P stockholders (acting

always for the benefit of all stockholders through petitioner as the Group's chief counsel) dared oppose. But the I.C.C. examiner indicated sympathy, and the Development Group obtained the addition of Stage Two, which so far has produced some $300 per share additional for the B&P stockholders from the equitable trust.

From time to time Judge Ford (B&P's late reorganization judge) issued a call for petitions for interim allowances from the estate for expenses of parties, including compensation of counsel. Such allowances hold top priority as administration claims. The latest call was made in 1971; the final call has yet to be made. Pursuant to the 1966 call petitioner filed an interim application for compensation at barebones level, explicitly reserving his right to apply later on for a supplemental allowance in the contingent event that "the success factor" (large realizations from the proposed B&P equitable trust) should materialize. He received an allowance covering 452 weeks of work spread over 12 years. The court approved the I.C.C. report finding that but for the insistence of the Development Group (acting through petitioner) the principle of the B&P equitable trust would never have come into being – but with this *caveat:*

> "The ultimate worth . . . cannot be measured at this time."

(*In Re Boston & Providence R. Corp.*, 428 F.2d 159, 162 (1970). *Boston & Providence R. Corp. Reorganization,* I.C.C. Finance Docket 12131, Examiner Clerman's Report, mimeo sheet 41 (1967). (See sheets 23-30, 41-43.)

In 1974 the district court had pending before it subsequent applications of this petitioner for allowances reflecting the success factor (as shown by 1973 payments to the

stockholders out of the equitable trust). A second expense fund was reserved temporarily, from proceeds of a large resale of B&P properties to the Commonwealth of Massachusetts. Petitioner sought to enjoin distribution of the second fund pending the settlement of his claims by negotiations with the Penn Central trustees (which seemed promising) or by adjudication. In allowing the second fund to be distributed the Court of Appeals regarded petitioner's claims as lying primarily against the basic B&P expense fund in question now. The Court recognized his claim for the delayed success factor, subject to proof. *In Re Boston & Providence R. Corp.*, 501 F.2d 545, 547-549 (1974). (Memorandum and order on rehearing, October 18, 1974.)

The district court's 1976 action

On June 24, 1976, the district court instructed its trustee to transfer the B&P expense fund to the Penn Central trustees. Its simple order did not mention the objections. Five parties appealed. The district judge stayed his instruction pending final disposition on appeal.

The shifting positions of the Court of Appeals

First position. The Penn Central trustees moved in the Court of Appeals for summary affirmance, invoking the First Circuit's Rule 12 for quick disposition of appeals that do not present a substantial question.

On November 5 the Court of Appeals promptly granted the motion, without briefs or oral argument. It overruled the contentions that there were prior pending and inchoate claims against the fund by misreading the record, saying:

> "The district court in September, 1974, directed payment of final expenses out of the debtor's

> expense fund, and that order [sic] has never been appealed. Since the time for appeal has long since passed, this issue is not properly before us."

Second position. On December 10 the Court withdrew that statement and asked the Penn Central trustees (and another party) to show why claims for services rendered after June, 1971, may not still be adjudicated. On January 17, the Court's third order reversed the district court's order. But it then went on to hold that this petitioner is barred, not for failing to appeal from a 1974 judgment on his claims – but because he had not appealed from a *lack* of a judgment adjudicating his claims.

> "Appellant Rood, having not appealed from the district court's failure to allow his allegedly pending petitions, has waived any claim to an allowance for services rendered or expenses incurred during this period."

The Court stated that its reversal of the district court was subject to a limitation that only services rendered after June, 1971, were to be considered.

Thus the Court of Appeals, in an adaptation of Zeno's Paradox, by dividing the long project into two arbitrary periods, before and after midnight June 30, 1971, so to speak, sawed the patient in two:

> Before June 30: Work done. Value deferred. Uncompensable.
>
> After June 30: Value produced. Work done previously. Uncompensable.

Petitioner then showed that there was never any adjudication of his pending petitions in the district court from which he could have appealed. *An attempted appeal would have been hooted out of court.*

True, in September, 1974, the district court had entered some orders for some allowances to some other parties, *but its only 1974 action on the pending petitions of petitioner Rood was agreed inaction.* Without objection the district court had filed a 1974 agreement of parties in the record (the Halley letter, appended) for allowances to be made to other parties while adjudication of this petitioner's claims was passed over.[1]

Petitioner showed that, in the face of Civil Rules 58 and 54(b), the district court could not possibly be deemed to have adjudicated his pending petitions in 1974 or to have terminated the proceeding (*sub silentio* or otherwise). Petitioner showed this Court's explanation of the absolute command of revised Rule 58 (as stated *supra*) quoting Professor Moore, and concluding thus:

> "But whatever may be the appropriate sanctions available in a particular case . . . we do not believe that a case-by-case tailoring of the 'separate document' provision in Rule 58 is one of them. That provision is, as Professor Moore states, a 'mechanical change' that must be mechanically applied in order to avoid new uncertainties as to the date on which a judgment is entered.

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[1] In its third order (January 17) the Court of Appeals criticized petitioner for not having appealed from district court awards to other petitioners in September, 1974. But petitioner Rood had no reason to appeal from those allowances.

His claims were different from the others. The other petitioning lawyers attained their goal when the plan was put into effect in April, 1971. But petitioner Rood was primarily concerned with the realization that might come to the B&P stockholders through successful administration of Stage Two, *in futuro.* That has nearly quadrupled the $110 goal which only the Development Group opposed.

> We grant the petition for certiorari, reverse the judgment of the Court of Appeals, and remand for further proceedings consistent with this opinion."
>
> *United States v. Indrelunas*
>
> 411 U.S. 216, 229-222 (1973) (Per Curiam)

Petitioner suggested how the Court of Appeals might correct the error of its Second Position, thus:

> "An appropriate procedure now would be to issue a mandate directing entry of judgment on Mr. Rood's claims in conformity with Rule 58, either allowing or disallowing. However, appellant still maintains that the soundest solution is set forth in Appellant's Opposition to Summary Dismissal, filed October 25, 1976, pages 20-22: *referral to a special master.*"

Third position. Then the Court of Appeals shifted again. Conceding *arguendo* that his pending petitions had not been adjudicated and that petitioner could not have appealed in 1974 and therefore had not waived his claims by not then appealing, the Court then invented a new reason for summary dismissal, stated in its fourth summary order, dated February 2. The new reason was that the Court of Appeals ought to impose forfeiture on petitioner as a matter of equitable discretion. However great such forfeiture might be, it would be deemed necessarily fair because the benighted petitioner had not *anticipatorily* saved the Court from falling into the factual and legal errors of the Court's Position One and Position Two. Thus the Court (without inquiring into the extent of the injury) justified bringing petitioner and his associates to grief. Petitioner maintains his claims for the benefit of others besides himself (including creditors). The same Court of Appeals in its reported

1974 decision had identified his claims correctly as including a claim for 5 per cent of $12,000,000 (less the interim allowances on the 1966 petitions).

In reaching its Position Three the Court had to deal with the arguments of petitioner's prompt petition to reconsider the new holdings in the order of January 17. The Court accomplished that by rejecting and physically returning the pleading back to petitioner.

Fourth position. In a prompt petition to reconsider the new holdings of the fourth order (February 2) petitioner showed that the Court may not retroactively require him to plead anticipatorily the absence of a judgment barring his claims (which he had always, like the Court of Appeals in 1974, described as *pending*.) To require such anticipatory pleading would be, as the Supreme Court has said –

> "inconsistent with any known rule of pleading, so far as we are aware, and is improper."
>
> *Boston Mining Company v. Montana Ore Company*
> 188 U.S. 632, 638-639

Petitioner also argued that by springing a new bar against him late in the litigation and refusing to hear (by physically rejecting) his valid, prompt refutation, the Court of Appeals deprived him of his right to due process of law in the primary procedural sense of that term, violating the Fifth Amendment, and that to cling to such error in the face of timely correction was *entrapment* – citing *Brinckerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 677-681 (Brandeis, J.).

In its fifth order of February 24, the Court of Appeals dealt with the arguments on anticipatory pleading and

deprivation of procedural due process in two ways. First, it was too late because the Court's mandate had gone down to the district court instantly on February 2. (See Clerk's Letter of March 2, appended.) Secondly, considering the arguments on their merits, it held that they did not warrant altering the ultimate position of the Court.

That ultimate position is that no injustice is being done.

Throughout all its shiftings of position, ending on a cryptic bare assertion that no injustice is being done, the Court clung to its original dismissal at the threshold with respect to the claims in question (although its reversal of January 17 allowed the district court to adjudicate inchoate claims for services performed after June 30, 1971). The Court throughout refused plenary disposition and never allowed an oral appearance. Finally, the Court left its decision in such a state that it is not possible now to make out or descry what its *ratio decidendi* was, on the basis of facts in the record which are not in dispute.[2]

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[2] The Court of Appeals also persistently refused to mention other vital questions presented in the appeal, challenging the propriety of distributing the expense fund to Penn Central in view of Penn Central's breach of trust alleged to have been committed in 1976 by the trustees' selling their remaining B&P properties to another carrier without preserving the B&P equitable trust as required by the 1971 B&P consummation decree, which made them trustees for the proper administration of Stage Two for the B&P stockholders.

REASONS FOR GRANTING THE WRIT

Haste makes waste. [*Lewis v. State of New York*, 547 F.2d 24 (C.A. 2).] The First Circuit, compounding its original error by obstinate insistence on summary dismissal at any price, has produced an appellate quagmire.

Starting off on a mistaken assumption, the Court of Appeals has progressed to a termination imposing forfeiture of a right of appeal and a major claim because the petitioner had not disabused the Court of its misapprehension before its misreading of the record came to light.

After being shown its original plain error, that Court should not be allowed to reverse its course, shift its grounds, and rationalize its summary dismissal without elaboration, while dispensing with briefing and oral argument.

A thrice-reiterated summary dismissal cannot rest on shifting sands and survive retraction and abandonment of its previous major premises.

Unless that Court will render a reasoned account, it is impossible to understand its underlying premises. A court of appeals ought to lead the way and set a good example by delivering a reasoned, articulate explanation of its dismissal, by giving a *ratio decidendi* that measures up to the standards which it exacts from administrative agencies when it subjects them to judicial review.[3] Patient study herein has not deciphered the First Circuit's final *rationale*.

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[3] *Atchison, T. & S.F. Ry. v. Wichita Board of Trade*, 412 U.S. 800, 807 (1973). *S.E.C. v. Chenery*, 332 U.S. 194, 196 (1947). *N.L.R.B. v. Wyman Gordon*, 354 U.S. 759, 767 (1969).

Summary dismissal has been abused. A court may not justify summary dismissal and persistent adherence to its first impressions[4] by vague reference to vagrant equities founded on undeveloped tenuous notions of fault and neglect. It may not gloss over a failure to specify a legally sufficient reason for summary dismissal by casually observing that no injustice is being done – for that is no more than a residual conclusion which presupposes some other solid stated ground already expressed. It is not an explanation nor a justification for nonchalance with the facts and a dismissive attitude toward the materiality of facts misunderstood. It is emphatically not a legally self-sufficient basis for summary dismissal standing by itself unamplified.

The Court of Appeals is out of order when it imputes a lack of skill in the handling of an appeal, by condemning before hearing and without first assuring itself in the time-honored, conventional, judicial way (receiving briefs and oral argument) that summary dismissal stands on firm ground. It may not persist through thick and thin to offhand conclusions long after the premises have been shot down. The Court should have made amends for its previous dismissal founded on a hasty misreading of the record, by a fresh start abjuring preconceptions. To hear before it condemns, to resist self-justification, and to maintain an open mind were imperative. But instead its series of reiterated summary dismissals on unargued bases, and its imposition of a duty on appellant to negate unforeseeable

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[4] Jacques Barzun, *Clio and the Doctors*, Univ. of Chicago Press, 1974, p. 50, qutoing from Ulric Neisser in *Science*, notes the universality of "a certain reluctance to admit error . . . characteristic of people and institutions generally."

erroneous objections to his appeal *anticipatorily*, denied him the protection of Rule 58 and deprived him of procedural due process.[5]

A court should not casually and offhandedly dismiss an appeal taken by right merely because the court has done so before, without a conscientious effort to explore or ascertain whether any alternative procedure withstanding analysis was available to petitioner and reasonably discoverable by practitioners before the court.[6]

After a court has had to acknowledge the error of its way in prematurely dismissing an appeal in consequence of its own mistake, it is unjust to penalize the victim by then requiring him to run the gauntlet and to spike unargued objections to his appeal going to its merits. It is unjust to fault him for not having met them before they were raised by the Court of Appeals initially, and then to deny him the opportunity to meet its ill-defined objections on the Catch-22 ground that he is injecting new issues. It is self-evident that opportunity to present procedural due process objections to the stumbling blocks interposed by the Court *sua sponte* is required by due process and elementary considerations of fairness.

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[5] For a court to proceed on its own in injecting new and unsifted theories without the help of counsel presents dangers.

A fortiori, if the court is impervious to reason and shakes off refutations by stating that no injustice has been done it adds a new terror to federal practice.

[6] None of the five orders addresses in any detail the question of what avenues were open to petitioner. The existence of a 1974 order appealable by him was simply assumed.

The Court of Appeals was duty-bound to resist the natural tendency to carry over a bias resulting from its original dismissal. The Court should have refrained from persisting in summary dismissal until it could formulate a reasonable conclusion not dependent on its original erroneous dismissal.

By their nature foreclosure and preclusion, when invoked to dismiss an appeal, require the specific elements to be articulated. In this case there is a conspicuous absence of a legally sufficient basis for dismissal on jurisdictional grounds taking cognizance of the actual factual background. The merits were never even canvassed. The Court should scotch the appearance of *a parti pris* rationalization and predetermined outcome by disclosing what its operative premises were after its original assumption was discredited.

It is an abuse to take shelter behind rehearing rules when the Court espouses novel theories. (Not that any of petitioner's pleadings were late under the Appellate Rules.) To deny an opportunity to subject the new theories and their supporting facts to strict scrutiny is to block correction of erroneous presuppositions and misapprehensions latent in the new *rationale*, and to the extent that the new substitute grounds are novel or undisclosed it denies procedural due process. *Brinckerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 677-8. *N.A.A.C.P. v. Alabama*, 357 U.S. 449, 457-8. *Davis v. Wechsler*, 263 U.S. 22, 24.

A court may not insulate its orders from review by trapdoors unconstitutionally denying appellant an opportunity to respond to new matter, simply by directing the clerk to return the submission as untimely (although prompt under the Appellate Rules). (*Cf.* Order of February 2, 1977,

the second sentence.) The district court had not fully disposed all claims before it. There is no fixed rule that a district court order or batch of orders presumptively ties up all loose ends and disposes *all* claims. *Civil Rules 54(b) and 58.* Yet that fallacy has plagued this case throughout its sojourn in the Court of Appeals.

Petitioner is entitled to a reasoned statement of satisfactory and legally sufficient bases for the summary dismissal. When the Court of Appeals refuses to receive as new matter argument as to appealability and consequent deprivation of due process it bars the last avenue to redress in that court, erects improper barriers against correction, and clogs the right of appeal in a manner not authorized by 28 U.S.C. 1291.[7]

The cavalier attitude of the Court of Appeals to persist in its initial impulse to dismiss notwithstanding the invalidation of its premises departs so far from acceptable procedures as to demand the supervisory action of the Supreme Court.

It is a reasonable interpretation that a sense of untimeliness and waiver by failure to take an appeal from a supposititious order of September 3, 1974, has influenced if not dominated the entire proceeding below and has been smuggled in through the back door to the very end. Certainly the Court of Appeals has not yet candidly owned up to its errors but has defensively issued variations which do

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[7] "If we are to keep our democracy there must be one commandment: Thou shalt not ration Justice." Address of Judge Learned Hand before the Legal Aid Society of New York, February 16, 1951, quoted in Marvin Comisky, *Declare an End to Judicial Quotas*, 36 Federal Bar Journal 30, 40 (Winter-Spring 1977).

not come to grips with the questions of what petitioner ought to have done and whether he could have appealed from the orders of awards on September 3, 1974, to some other parties, despite his lack of objection to those awards. (See the Hally letter appended.) He is faulted for not having disabled the anti-aircraft guns of the Court of Appeals which themselves did not reach their target (his appeal) until after the guns started firing – but up to that point he had no way of knowing that they were firing. *Lex non cogit ad impossibilia.*

The law of pleading does not require anticipation even of foreseeable objections, much less those that are flawed in their reasoning.

The actions of the Court of Appeals present such a procedural foul-up as to outrage one's sense of the decencies and proprieties. Petitioner has been euchred out of his appeal on the basis of a feeling within the Court of Appeals which it has not been able to substantiate: namely, that somehow, somewhere, there is either an impediment to the appeal or some inequity in allowing it to be maintained. But the feeling is an amorphous sentiment which has not yet been whipped into shape as the end product of judicial reasoning demonstrating that what actuates it is more than a mood or impression or desire to avoid. It does not show that due cognizance of the hard, refractory, stubborn facts in the particular case has been taken.

It will not do to shoot down appeals by following the reasoning of Dr. Fell's case, for arbitrary elimination destroys public confidence that the judiciary's performance is based on the rule of law.

CONCLUSION

Wherefore petitioner prays that a writ of certiorari issue to the United States Court of Appeals for the First Circuit to review its summary dismissal of petitioner's appeal, No. 76-1370.

Respectfully submitted,

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July 2, 1977

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

In the Matter of	)	*In Proceedings for the*
	)	*Reorganization of a*
BOSTON & PROVIDENCE	)	*Railroad*
RAILROAD	)	
CORPORATION,	)	
Debtor.	)	No. 62413

ORDER

It appearing from the quarterly report of Charles W. Bartlett, Trustee, dated December 31, 1975, and the Petition of the Trustees of the Property of the Penn Central Transportation Company, filed March 30, 1976, that it is now proper to implement the third priority of payment listed in Paragraph 12 the Plan of Reorganization of the Boston & Providence Railroad Corporation which was herein approved on November 8, 1966, due notice having been given to all parties in interest, now, upon the said petition, it is hereby

ORDERED that Charles W. Bartlett, Trustee, is directed to pay to the Trustees of the Penn Central Transportation Company, within thirty days from the entry hereof, all moneys due and owing pursuant to the aforementioned Plan of Reorganization in the amount of $385,187.04, as specified in the Trustee's quarterly report dated December 31, 1975, plus all interest that has accrued since the closing date of that report and less any necessary expenses.

June 24, 1976
Date

/s/ Andrew A. Caffrey
District Judge

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 76-1368.

IN RE

BOSTON AND PROVIDENCE
RAILROAD CORPORATION,

DUMAINES,

No. 76-1370.

IN RE

BOSTON AND PROVIDENCE
RAILROAD CORPORATION,

BOSTON & PROVIDENCE RAILROAD
DEVELOPMENT GROUP ET AL.,
Appellants.

MEMORANDUM AND ORDER

Entered November 5, 1976

Upon consideration of the Penn Central Trustees' Motion for Summary Disposition, and all the oppositions thereto, the court hereby grants the motions. As to the argument of the Dumaines that an unbroken prior history of reimbursement by the Penn Central is no guarantee of future performance, we can only note that such an argument does not provide any reason to believe that the Penn Central will therefore now refuse reimbursement.

As to appellant Rood and the Development Group, we note that the Interstate Commerce Commission rejected their claim for services based on the "success Factor" theory, and awarded them fees of $90,000.00. The I.C.C.'s last action, a denial after reconsideration, occurred on June 6, 1974. The district court in September, 1974, directed payment of final expenses out of the debtor's expense fund, and that order has never been appealed. Since the time for appeal has long since passed, this issue is not properly before us.

The judgment of the District Court is affirmed.

By the Court:

/s/ Dana H. Gallup
Clerk.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 76-1370

IN RE BOSTON & PROVIDENCE
RAILROAD CORPORATION

ORDER

Entered December 10, 1976

The court, in reviewing the petition for rehearing of Armistead B. Rood, notes that the district court's order of April 26, 1974, was confined to petitions for allowance of compensation for services rendered between July 1, 1966, and June 30, 1971, and that the allowances made on September 3, 1974, were similarly limited. Additionally, in

Judge Ford's order of February 23, 1971, the district court reserved jurisdiction "to make allowances of compensation for services heretofore or hereafter rendered . . . in connection with these proceedings or the Plan or the execution of this order, out of said fund of $550,000." Section V, paragraph 2. The court, therefore, may have misspoken itself, in its memorandum and order of November 5, 1976, in referring to the district court's action of September, 1974, as one which "directed payment of final expenses out of the debtor's expense fund, and that order has never been appealed."

The court therefore requests the appellees, the Trustees of the Penn Central, and the Charge Trustee, to submit, by December 23, 1976, a memorandum addressed to the following questions:

1. Where and in what manner does the record show that appellant Rood or the Development Group is foreclosed from pressing in the district court or on appeal any claim for services rendered after June 30, 1971?
2. If such claim is not foreclosed, contrary to our statement in our memorandum and order of November 5, 1976, what implications does such fact have on our affirmance of the order of the district court of June 24, 1976, directing the transfer of the moneys remaining in the debtor's expense fund to the Penn Central Trustees?
3. If the claim for post-June 30, 1971, services has not been foreclosed, what procedures exist for the consideration and adjudication of such a claim?

By the Court,
/s/ Dana H. Gallup
Dana H. Gallup
Clerk.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 76-1370

In the Matter of
Boston and Providence Railroad Corporation,
Debtor

ON MOTION FOR RECONSIDERATION

Before Coffin, Chief Judge,
and Campbell, Circuit Judge

Entered January 17, 1977

Upon appellant Rood's Motion for Reconsideration and upon consideration of all pleadings and exhibits filed with the court, and memoranda submitted in response to the request of the court, it is ordered that the matter be remanded for the limited purposes hereinafter described.

The court is satisfied that Rood no longer has any reviewable claim for services rendered for the period July 1, 1966, to June 30, 1971. The Interstate Commerce Commission rejected his claim on February 4, 1974, 342 ICC 859, 870-873, which was then acted upon by the district court on May 17, 1974, and implemented by allowances granted on September 4, 1974. This court underscored that appellant's 1966-1971 claims were before the district court in the period between the April, 1974, call and the September, 1974, allowances. *In re Boston & Providence Railroad Corp.*, 501 F.2d 545, 548 (1st Cir. 1974). Rood proffers no reasonable basis for his having failed to appeal from the lower court's awards of September 3, 1974. Appellant Rood, having not appealed from the district court's

failure to allow his allegedly pending petitions, has waived any claim to an allowance for services rendered or expenses incurred during this period.

As to claims for the period subsequent to June 30, 1971, we may have misspoken in our order of November 5, 1976 to the extent that we indicated that no issue regarding fees or disbursements could now be raised. The district court's orders of September 3, 1974 were predicated on calls for petitions for allowances of compensation and expenses from July 1, 1966 to June 30, 1971. Nothing called to our attention indicates that claims for further allowances have been barred. While we are by no means sure that any valid claims exist, we deem it important that an opportunity be afforded for their presentation. We therefore grant the petition for rehearing and amend our order of November 5, 1976 only to the extent that we remand to the district court the matter of determining whether any parties are entitled to compensation for services rendered and expenses incurred subsequent to June 30, 1971, and, if so, in what amounts.

By the Court,

/s/ Dana H. Gallup
Clerk

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 76-1370.

IN RE
BOSTON & PROVIDENCE
RAILROAD CORPORATION,

BOSTON & PROVIDENCE RAILROAD
DEVELOPMENT GROUP ET AL.,
Appellants.

MEMORANDUM AND ORDER
Entered February 2, 1977

In his last two Motions for Reconsideration, appellant Rood argued that there was no final order from which he could appeal entered by the district court in September, 1974, and that his objections to that court's approval of the I.C.C. orders is therefore still pending. Since this argument was presented in neither his Motion to Stay filed on August 6, 1976, nor in his Opposition to the Motion for Summary Dismissal, dated October 25, 1976, and since no satisfactory explanation is proffered, the motion for rehearing is returned, pursuant to our local rule 15. Moreover, we would add that in the circumstances narrated in our order of January 17, 1977, there is no injustice imposed on an appellant who did not raise this argument before the district court at all, and who first raises it before us on a motion for reconsideration.

It is further ordered that mandate issue forthwith.

By the Court:

/s/ Dana H. Gallup
Clerk.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 76-1370

IN RE

BOSTON & PROVIDENCE
RAILROAD CORPORATION,

BOSTON & PROVIDENCE RAILROAD
DEVELOPMENT GROUP ET AL.,
Appellants.

ORDER OF COURT

Entered February 24, 1977

The petition for reconsideration of the order of February 2, 1977, dated February 14, 1977, is hereby denied as being untimely as mandate had issues; moreover, upon review of the motion, no good reason appears why mandate should be recalled.

By the Court:

/s/ Dana H. Gallup
Clerk.

OFFICE OF THE CLERK
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

DANA H. GALLUP
CLERK

1606 JOHN W. McCORMACK
POST OFFICE AND COURTHOUSE
BOSTON, MASS. 02109
(617) 223-2065

March 2, 1977

Armistead B. Rood, Esquire
3520 Thirty-Fifth St., N.W.
Washington, D.C. 20016

Re: No. 76-1370. In Re: Boston & Providence Railroad Corp., etc.

Dear Mr. Rood:

In reply to your letter dated February 26, 1977 received today, you will recall that the last paragraph of the February 2 Memorandum and Order provided:

"It is further ordered that mandate issue forthwith."

In accordance with that order, the mandate was issued forthwith, i.e. on February 2, 1977.

Sincerely yours,

Dana H. Gallup
Clerk.

DHG:lac

Supreme Court of the United States

No. A-861

IN RE BOSTON & PROVIDENCE RAILROAD CORPORATION,

Debtor

ARMISTEAD B. ROOD,

Petitioner

FURTHER
ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, FURTHER extended to and including July 24, 19 77, without prejudice to the Court's consideration of whether this application has been filed in time.

/s/ Wm. J. Brennan, Jr.
Associate Justice of the Supreme Court of the United States

Dated this 20 day of June, 19 77.

NUTTER, McCLENNEN & FISH

75 FEDERAL STREET
BOSTON, MASSACHUSETTS 02110

CABLE ADDRESS "DUNTER" AREA CODE 617 423-7011

DELIVER
June 19, 1974
0294-06

The Honorable Andrew A. Caffrey
United States District Court
U.S. Postoffice and Courthouse
Boston, Massachusetts 02109

Re: Boston & Providence Railroad Corporation,
Debtor - In Proceedings for the Reorganization
of a Railroad - No. 62,413

Dear Judge Caffrey:

In connection with the Motion of Armistead B. Rood for Continuance of Proceedings Scheduled for June 21, 1974 (which we understand the Court has acted on by continuing the proceedings until July 22, 1974), the undersigned and Laurence M. Channing of Hill & Barlow, had telephone conversations on June 18, 1974 with Charles R. Nesson, Esquire, Mr. Rood's attorney, concerning the possible effect of the Motion on the status of the fee applications in the above proceeding of Hill & Barlow, this firm (and Palmer & Dodge). This letter is to confirm for the record Mr. Nesson's statement of position on that subject: Mr. Nesson stated, in substance, that allowance of Mr. Rood's particular Motion was not intended to delay the action of the Court in passing on and settling the fee applications of these three firms; and, specifically, that Mr. Rood does not object to the entry of final orders by the Court on such fee applications.

Respectfully,

John R. Hally

JRH:sp

Copies to all counsel
(as per attached certificate of service)

No. 77-19

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

ARMISTEAD B. ROOD, *Petitioner,*

v.

TRUSTEES OF THE PROPERTY OF THE PENN CENTRAL TRANSPORTATION COMPANY, *Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR RESPONDENTS THE TRUSTEES OF THE PROPERTY OF THE PENN CENTRAL TRANSPORTATION COMPANY IN OPPOSITION

JOHN VANDERSTAR
ROBERT D. DANIEL
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Washington, D.C. 20006

Attorneys for Respondents
The Trustees of the Property
of the Penn Central Transportation
Company

August 4, 1977

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Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-19

ARMISTEAD B. ROOD, *Petitioner,*

v.

TRUSTEES OF THE PROPERTY OF THE PENN CENTRAL TRANSPORTATION COMPANY, *Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR RESPONDENTS THE TRUSTEES OF THE PROPERTY OF THE PENN CENTRAL TRANSPORTATION COMPANY IN OPPOSITION

STATEMENT

The Boston and Providence Railroad Corporation ("B&P") entered reorganization in 1938. After considerable litigation, a Plan of Reorganization was finally approved.[1] Under the Plan, The New York,

[1] Various orders and opinions of the reorganization court and the court of appeals are reported at 260 F. Supp. 415 (D. Mass. 1966); 413 F.2d 137 (1st Cir. 1969); 428 F.2d 159 (1st Cir. 1970); 435 F.2d 825 (1st Cir. 1970); 501 F.2d 545 (1st Cir. 1974).

New Haven & Hartford Railroad Company ("New Haven") was to acquire the assets of the B&P but leave in the custody of the B&P Trustee a fund to be used for payment of various taxes and other expenses, including fees and expenses of attorneys and others in connection with the working out of the Plan, as provided in Section 77(c) of the Bankruptcy Act, 11 U.S.C. § 205(c).[2]

Respondents the Penn Central Trustees, as successors to the New Haven,[3] acquired the assets of the B&P pursuant to the Plan of Reorganization on April 20, 1971. Thereafter, the district court invited petitions seeking compensation out of the expense fund for services rendered from July 1, 1966, through June 30, 1971. Interim payments had previously been made to cover services performed before July 1, 1966. Several petitions were duly filed and referred to the Interstate Commerce Commission for hearing; Section 77(c)(12) of the Bankruptcy Act then provided that awards of compensation made by the district court could not exceed amounts found to be reasonable by the ICC after a hearing directed to that issue.

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[2] Because the B&P assets included valuable real estate which might be sold for a nonrailroad use, an arrangement was made that would enable stockholders of the B&P to receive for several years the net cash proceeds from real estate sales of a specified nature occurring after consummation of the Plan of Reorganization. (Petitioner erroneously refers to this arrangement as "Stage Two" of the Reorganization. (Pet. at p. 6.) In fact, the real estate transactions were expected to occur, and did occur, after the Plan of Reorganization had been consummated.)

[3] *See* Pennsylvania R.R.—Merger—New York Central R.R., 334 I.C.C. 25 (1968); Boston & Providence Railroad Corp.—Reorganization, Finance Docket No. 12131—Pennsylvania R.R. Securities & Assumption of Obligations, Finance Docket No. 24361, served April 13, 1971.

One of the attorneys who sought compensation from the expense fund was Mr. Rood, petitioner in this Court. He claimed approximately $150,000 for his services as chief counsel and "technical adviser" to a small group of stockholders, called the Boston & Providence Railroad Development Group, who volunteered their views and arguments at various points during the reorganization proceeding. (The Development Group was not the official representative of the B&P stockholders pursuant to Section 77(p) of the Bankruptcy Act.) An extensive record developed at the ICC showed, among other things, that Mr. Rood and the Development Group, although they had at one time been helpful and effective on some important matters, had thereafter been responsible for fruitless litigation that substantially delayed the approval of a final Plan of Reorganization and caused attorneys representing other parties (such as the official stockholders' committee) to spend hundreds, if not thousands, of hours of time that was of no benefit to the bankruptcy estate and yet had to be compensated out of the estate. Petitioner's efforts included several petitions for rehearing or reconsideration, frequent requests for extension of time to file briefs, records and motions, and three unsuccessful petitions for certiorari previously submitted to this Court.[4] (See the chron-

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[4] Petitioner has unsuccessfully challenged several prior actions of the court of appeals and has otherwise sought relief in this Court in the following instances:

1. Petitions for mandamus and certiorari challenging the court of appeals' dismissal of the district court's affirmance of the B&P Plan were denied December 4, 1967. 389 U.S. 974.
2. Petition for certiorari challenging the court of appeals' affirmance of the district court's confirmation of the B&P Plan was denied March 16, 1970. 397 U.S. 979. Petition for

ology of the B&P Reorganization activity *after* the ICC approved the B&P Plan of Reorganization, 327 I.C.C. 10 (1966), in Appendix B of the ICC hearing examiner's Report and Order, Boston & Providence Railroad Corporation Reorganization (Compensation and Expenses), Finance Docket No. 12131, served August 24, 1972.)

The ICC affirmed the Report and Order of the hearing examiner insofar as it determined that petitioner Rood was entitled to no compensation for his activities during the 1966-71 period,[5] and the ICC also added this comment about his activities:

> ". . . Mr. Rood's efforts have been directed at modifying or challenging the plan before every possible tribunal. This effort has not yielded any modification of the plan and has had the effect of adding substantial costs of litigation to the estate's burden." 342 I.C.C. 859, 871 (1974).

The ICC's Report on compensation was duly filed in the district court, which then issued an Order setting the matter for hearing. In its Order, the district court listed by name only those persons the ICC had recommended receive compensation; the list did not include those for whom no compensation was recommended, including petitioner Rood. The Development

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rehearing of denial of petition for certiorari was denied April 27, 1970. 397 U.S. 1071.

3. Petition for certiorari challenging the court of appeals' affirmance of the district court's order authorizing consummation of the B&P Plan was denied May 17, 1971. 402 U.S. 989. Petition for rehearing of denial of petition for certiorari was denied June 21, 1971. 403 U.S. 940.

[5] Mr. Rood had received an award of compensation for his efforts prior to July 1, 1966.

Group was included, because the ICC had recommended that the Group receive reimbursement for certain expenses it had incurred. Also listed in the Order was the firm of Palmer & Dodge, which had represented the Development Group and petitioner Rood at various stages of the prior proceedings.

Memoranda were filed by various parties, a hearing was held, and in due course the district court, on September 3, 1974, entered orders awarding compensation in accordance with the ICC recommendations. Petitioner Rood took no action to request that the district court enter an order relating to his own petition for compensation.

The reorganization proceedings remained in this posture for over a year. In February 1976, the Penn Central Trustees filed a petition in the district court seeking a final turnover to them of the balance remaining in the B&P expense fund. The petition alleged that all payments from the fund required by the district court's orders of September 3, 1974, had previously been made and that no further claims against the fund could be made. After various parties filed memoranda, the district court held a hearing on the turnover petition on May 3, 1974. Three attorneys for the Development Group interests appeared at the hearing; petitioner Rood was one of them. They argued that Mr. Rood, who claimed compensation for work done *after* June 30, 1971, should still be entitled to file a claim; the Penn Central Trustees opposed this.[6] Not

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[6] The Penn Central Trustees took the position that no compensation for efforts that post-dated the April 20, 1971, consummation of the Plan of Reorganization could be awarded out of the expense fund, inasmuch as the fund had been established to com-

a word was said in that hearing by any of the three Development Group attorneys about the failure of the district court to enter an order on Mr. Rood's claim for compensation for the 1966-71 period, although the point had been mentioned obliquely in memoranda filed in the district court.

The district court granted the turnover petition. (Pet. at p. 1a.) Various parties (including petitioner Rood) appealed, and the Penn Central Trustees, acting pursuant to Rule 12 of the Rules of the First Circuit, moved for summary affirmance. The appellants, including petitioner Rood, filed memoranda in response to the motion, and on November 5, 1976—some thirty-eight years after the B&P went into reorganization—the court of appeals granted the motion for summary affirmance of the turnover order. (Pet. at pp. 2a-3a.)

Petitioner Rood moved for rehearing of this order. In large part, this effort was successful, because the court of appeals acknowledged what it deemed an error in its earlier order; it ruled that parties could indeed file claims for compensation for services rendered on and after July 1, 1971. (Pet. at pp. 5a-6a.) The court thus remanded the case to the district court for further proceedings on that point.[7] The court of appeals ruled against petitioner Rood on his contention that his claim for compensation for the 1966-71 period was still open because of the failure of the

pensate for work done in connection with the "working out" of that Plan of Reorganization. *See* 342 I.C.C. at 868; 413 F.2d at 140; 501 F.2d at 547-48.

[7] Although the remand order was entered January 17, 1977, petitioner Rood has not yet presented any claim to the district court.

district court to enter a separate order to implement the recommendation of the ICC that no compensation be awarded to him. Several further efforts to have the court reconsider this point proved unsuccessful. (Pet. at pp. 7a-9a.) The court relied both on its rules relating to petitions for rehearing and on its view that in any case no injustice had been done in dismissing petitioner's appeal on this point.

REASONS FOR DENYING THE WRIT

1. The Court has no jurisdiction to consider this case.

Petitioner timely requested and obtained an extension of time to June 16, 1977, in which to file his petition. An application for a further extension would have been due June 6, because Rule 34(2) requires that an application to extend the time to file a petition for certiorari be filed at least ten days before the petition would otherwise be due, unless the petitioner shows extraordinary circumstances requiring that it be filed within the last ten days. Petitioner did not file his application to further extend the time to file his petition until June 16.[8] Petitioner's application on its face shows no extraordinary circumstances to justify a delay in filing his petition. As the record shows, petitioner is an experienced litigator whose delay should not lightly be excused.

The application for further extension of time having been untimely filed, the petition is out of time and the Court lacks jurisdiction.

[8] Mr. Justice Brennan granted the extension requested on June 16 but without prejudice to the Court's consideration of whether the application was timely. (Pet. at p. 10a.)

2. In any event, as a reading of the questions presented by the petition for certiorari demonstrates,[9] the issues raised by petitioner do not warrant this Court's attention. The aspect of Section 77(c) of the bankruptcy statute which controlled the district court's critical 1974 action has now been superseded by section 618(b) of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. 94-210, 90 Stat. 31, 117; therefore, a decision by this Court relating to Section 77(c) before it was superseded would be of no importance to other litigants. Moreover, petitioner has not shown that the court of appeals has abused its summary disposition procedure, warranting the exercise of this Court's supervisory powers.

The court of appeals correctly ruled that petitioner Rood no longer had a claim for expenses incurred prior to July 1, 1971. Under Section 77(c) of the bankruptcy statute, as it existed in 1974, the ICC established maximum limits of compensation for expenses incurred in the working out of the reorganization plan. The recent amendment to Section 77(c) has eliminated the ICC from this process, and thus the current procedures are entirely different from what they were in 1974.[10] At that time, however, the district court

[9] That is, if one can understand them. Indeed, not only are some of petitioner's questions virtually incomprehensible but the preamble to them contains a misstatement of fact. It is simply not true that petitioner's allegedly pending claims have "by agreement" been held in abeyance in the district court since 1974.

[10] Judge Anderson, sitting by designation in the New Haven reorganization proceedings, has held that the 1976 amendment terminated all of the ICC's powers and duties under Section 77. He ruled, therefore, that the ICC had no authority to establish maximum limits of compensation in the New Haven proceeding, even for expenses incurred prior to the effective date of that amendment. *See In re* The New York, N.H. & H.R.R., 421 F. Supp. 249, 252 (D. Conn. 1976), *aff'd*, 76-5025 (2d Cir. Mar. 18, 1977).

could award compensation only up to the limits established by the ICC. Its orders entered in September 1974 did exactly that. The ICC having denied Mr. Rood's claims in full, the district court had no discretion to enter an order awarding him compensation. All other parties to the reorganization considered the September 1974 orders to be the final disposition of all claims for expenses incurred between 1966 and 1971. For this reason the Penn Central Trustees filed their turnover petition in 1976.

It was petitioner Rood, not the court of appeals, who then trapped himself by failing to argue the alleged pendency of his claim for 1966-71 expenses in the district court. The Penn Central Trustees, in their turnover petition and at a hearing in which petitioner Rood participated, made two arguments: (1) the district court's orders in September 1974 were the final disposition of all claims for expenses incurred prior to July 1, 1971; and (2) no expenses incurred on or after July 1, 1971, were compensable from the debtor's expense fund. Petitioner Rood responded to the second contention, but did not raise any objection to the first point at the hearing in the district court. The district court ruled in favor of the position of the Penn Central Trustees, and the court of appeals affirmed. (Pet. at pp. 1a-3a.)

The critical order of the court of appeals was the order entered February 2, 1977. (Pet. at p. 7a.) Following normal appellate practice, the court of appeals

there declined to accept Mr. Rood's contention, in two motions for rehearing, that the district court's orders in September 1974 had not adjudicated his claim for compensation for the 1966-71 period. As the court said, "no satisfactory explanation [was] proffered" for the belated raising of what was claimed to be a vital point.

No satisfactory explanation was indeed proffered. Petitioner Rood contended that he had not anticipated the court of appeals' ruling that the September 1974 orders of the district court finally adjudicated all 1966-71 claims. But that is no explanation at all. As set forth above, the Penn Central Trustees made it perfectly clear—in their turnover petition, in the hearing thereon in the district court, and in their motion for summary affirmance in the court of appeals—that one of the necessary prerequisites to the turnover of the B&P expense fund was that all claims against the fund for services performed prior to the closing in 1971 had been finally adjudicated. It is difficult indeed to see how a litigant could have failed to grasp the importance of that point. That he did fail to grasp it, or that he simply neglected to address the point in a timely fashion—either in the district court or in the court of appeals—was, as the court of appeals correctly held, an insufficient explanation for his failure to raise the point until his petition for rehearing in that court.

Of course, the court of appeals is not so wedded to rules of procedure that it will allow them to work a manifest injustice. For in its order of February 24, 1977 (Pet. at 8a), the court made explicit what was surely implicit in its earlier order, namely, that it had reviewed the merits of the claim belatedly put forth

by petitioner Rood and had found "no good reason" to depart from its rules of practice. The reason is simple. Under the statute, before its amendment in 1976, the district court's power was circumscribed by the recommendation of the ICC; inasmuch as the ICC recommended that no compensation be awarded to petitioner Rood, the district court in 1974 had no discretion to make any award to him. *At no time did Mr. Rood explain to the court of appeals how the district court could have acted favorably on his petition for compensation.*

The court of appeals might well have concluded that petitioner, lacking any substance to his underlying claim, was simply casting about for colorable technical errors in an effort to prolong an aspect of the B&P reorganization proceedings, as he has done many times before.[11] Where a court of appeals has acknowledged an error in its original order and has remanded the case to the district court in order to permit a litigant to present a claim, it comes with ill grace for that same litigant to accuse that same court of appeals of abusing its procedures and setting "trap doors" which allegedly deny the litigant an opportunity to make just one more argument.

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[11] See pp. 3-4 and n. 4, *supra*. In an earlier decision relating to Mr. Rood's institution of vexatious litigation in connection with the B&P reorganization, the court of appeals stated that it was "all too aware of the harvest of exacerbation which hoary litigation reaps." 501 F.2d at 549.

CONCLUSION

The petition should be denied.

Respectfully submitted,

JOHN VANDERSTAR
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Attorneys for Respondents
The Trustees of the Property
of the Penn Central Transportation
Company

August 4, 1977

No. 77-19

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

IN RE BOSTON & PROVIDENCE RAILROAD CORPORATION,

Debtor,

ARMISTEAD B. ROOD,

Petitioner.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF ALBERT B. WOLFE & APPENDIX

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Attorney for Albert B. Wolfe, *respondent*

August 30, 1977

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-19

IN RE BOSTON & PROVIDENCE
RAILROAD CORPORATION,
Debtor,

ARMISTEAD B. ROOD,
Petitioner.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF ALBERT B. WOLFE

Albert B. Wolfe of Cambridge, Massachusetts (whose office address is Room 2800, 28 State Street, Boston 02109) hereby responds to the Petition of Armistead B. Rood for a writ of certiorari to the First Circuit.

Respondent Wolfe

As a member of the Development Group of B&P stockholders Mr. Wolfe was a party in the proceedings over the Penn Central trustees' petition of March 30, 1976, on which the district court issued its order now under con-

sideration (Petition, 1a). He was likewise an appellant in the Court of Appeals for the First Circuit in appeal No. 76-1370, in which that Court issued its five orders now under consideration (Petition, 2a *et seq.*). Thus he qualifies as a respondent herein before the Supreme Court.

Respondent Wolfe's interest is not the same as the primary interest set forth in the Petition for Certiorari. He is a representative B&P stockholder. As such he received and now holds certificates of beneficial ownership in the equitable trust of B&P real estate interests ("the B&P equitable charge") that was reserved for liquidation for the benefit of the stockholders as Part Two of their B&P reorganization settlement and was entrusted to the fiduciary management of the Penn Central trustees, all under the district court's B&P plan consummation order and under that court's continuing control.

As a member of the Group which (as fiduciaries) obtained that equitable trust for the stockholders, he has been especially concerned that it receive proper administration. Before 1976 stockholders were disturbed about this, especially because the peculiar arrangement will allow the Penn Central trustees to retain all B&P properties free and clear if not liquidated before 1979. The trustees' petition of March 30, 1976, for distribution of the B&P expense fund to them, coupled with their default in conveying most of their properties to Conrail brought the dissatisfaction to a head. The Development Group (Wolfe *et al.*) joined in objections of other parties that as a matter of provident responsibility the B&P expense fund must be preserved to finance essential protection of the stockholders.

ARGUMENT

Objections to the district court

Such objections were made to the successor district judge by the Shawmut Bank (the corporate indenture trustee for the stockholders): that the transfer to Conrail was a breach of trust in violation of the District Court's consummation order, that Conrail repudiated the trust, and that the Penn Central trustees had renounced obligation to pay Shawmut's expenses.

Such objections were also made by the largest public holder (an investment trust named Dumaines), showing that nobody knew what property was being conveyed to Conrail and which parts would be withheld, and asking to have the expense fund preserved, in view of the "outstanding matters left open under the B&P plan". Dumaines took the only provident position, viz. –

> "Dumaines therefore opposes allowance of the Petition for payment of the remaining B&P funds to the Penn Central trustees until such time as all matters relating to sale or transfer of the B&P real estate are finally settled."

The Development Group supported the objections of Shawmut Bank and Dumaines. All filed detailed supporting memoranda and there was a hearing.

The district court's decision

The district judge ignored all objections. He simply instructed distribution of the expense fund to Penn Central free and clear.

Questions to the Court of Appeals

Five parties appealed. Shawmut Bank later dropped its appeal. Respondent is informed that the Bank did not feel justified in incurring further expense of appeal under the circumstances. As Dumaines pointed out [Memorandum in opposition to summary dismissal, p. 6]:

> "The reluctance of the Charge Trustee [Shawmut Bank] to act in behalf of . . . [B&P certificate] holders when the debtor's expense fund is not available to it is amply evidenced by the fact that it has withdrawn its appeal to this Court."

By then it was clear that the Penn Central trustees had defaulted seriously under the equitable trust in violation of the B&P consummation decree. The Development Group, supporting the objections of the other appellants, also saw the expense fund as available to help reimburse the B&P stockholders for their damages suffered at Penn Central's hands. The Group's opposition to summary dismissal therefore submitted five questions relative to the administration of the B&P equitable charge (the equitable trust), asking –

1. Whether the B&P expense fund is available to secure effective administration of the equitable trust.
2. Whether the equities necessitate holding the expense fund to protect the stockholders.
3. Whether Penn Central's interest in the fund should pass to the public stockholders in the event of Penn Central's fiduciary default to them.

4. Whether, given the breakdown in the administration of the trust, the district court should exercise equitable supervision, even to the extent of amending the consummation decree.
5. Whether, in the circumstances, the public stockholders should be required to depend on Penn Central to finance their protection.

Two more questions concerned the allowances. A final question sought to invoke a special master. All Questions presented to the Court of Appeals are appended, *infra.*

The appellate court's avoidance

The Court of Appeals had only this to say about the five questions:

> "Upon consideration of the Penn Central Trustees' Motion for Summary Disposition, and all the oppositions thereto, the court hereby grants the motions. As to the argument of the Dumaines that an unbroken prior history of reimbursement by the Penn Central is no guarantee of future performance, we can only note that such an argument does not provide any reason to believe that the Penn Central will therefore now refuse reimbursement."

Nothing more. The Court issued summary dismissal, on the ground that the appeals did not present a substantial question. In subsequent orders the Court addressed only the subject of allowances and, although exhorted to do so, did not speak further on the stockholder questions.[1]

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[1] This is the omission of "vital questions" described in the Petition at page 13 n.

Respondent Wolfe's grievance

In failing to pass on the stockholder questions the Court of Appeals (in the words of Supreme Court Rule 19(b) –

> "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this court's power of supervision."

Why has this happened? In 1974 Judge Coffin noted that the B&P administration had been in the courts a long time. He used the term "hoary litigation". Actually the Boston court proceedings were used for years by the prospective purchasers (the old New Haven Ra[illegible] road managements) to keep the B&P in bondage. B[illegible] the Court of Appeals is not excused from doing its job.

It has indeed been a long time. But the B&P stockholders still have not received their full consideration under the B&P consummation decree. Their interests run through 1978. Therefore the Court of Appeals should be required to pass on the stockholder questions (as well as to give a reasoned explanation for its threshold barrier on the pending petitions for allowances). Summary process has indeed been abused.

The Supreme Court should not go into the merits of any substantive question below. Justice can be done by simply instructing the court below to do its job.

Respectfully submitted,

ROSS D. DAVIS
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910 Sixteenth Street, N.W.
Washington, D.C. 20006
Attorney for Albert B. Wolfe, *respondent*

August 30, 1977

ADDITIONAL APPENDIX ITEM

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 76-1370

In the Matter of
BOSTON & PROVIDENCE
RAILROAD CORPORATION,
Debtor

BOSTON & PROVIDENCE RAILROAD
DEVELOPMENT GROUP et al.,
Appellants

APPELLANTS' OPPOSITION TO
PENN CENTRAL MOTION
FOR SUMMARY DISMISSAL

. . .

October 25, 1976

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QUESTIONS PRESENTED

A. Relative to the administration of the B&P equitable charge

Q.1 May the B&P reorganization expense fund established under Paragraph 12 of the B&P plan continue to be held for expense incident to *the second stage* of the B&P reorganization settlement, to secure the effective administration of the equitable charge for all B&P stockholders?

Q.2 Given the District Court's assurance of the Court's continuing supervision, *plus* the power of the Penn Central Trustees to control the sale of the Boston & Providence Railroad on April 1, 1976, their dominance (as holder of the 48 per cent) among the B&P certificate (CCBI) holders, their holding the B&P properties as "grantor" and trustee for the B&P stockholders, their conveyance of the same to Conrail without imposing the trust on Conrail, and Conrail's repudiation of the trust, do not the equities necessitate holding the expense fund to protect the stockholders?

Q.3 If Penn Central has committed a default or breach of fiduciary obligation to the other B&P certificate holders, should not Penn Central's interest in the fund pass to the other holders?

Q.4 The administration of the second stage under the Court's reserved supervision has broken down in the face of unforeseeable troubles brought on by Penn Central. Should not the District Court apply equitable supervision to overcome the failure, perhaps amending the arrangement – and meanwhile holding that expense fund to protect the public stockholders?

Q.5 Under the circumstances, should the public stockholders be required to depend on Penn Central to finance their protection?

B. With respect to the claims for allowances

Q.6 Should the B&P reorganization expense fund be distributed to the junior claimant (PC) while there are prior claims for allowances still pending?

Q.7 Should Penn Central's petition for the fund be withdrawn because of an agreement with one of the pre-

sent appellants not to molest it pending the settlement of claims for allowances?

C. With respect to disposition of the present appeals

Q.8 Now that the Interstate Commerce Commission has been eliminated, is it appropriate to remand the proceeding back to the District Court for referral to a special master?

No. 77-19

Supreme Court of the United States

October Term, 1977

IN RE BOSTON & PROVIDENCE
RAILROAD CORPORATION,
Debtor,

ARMISTEAD B. ROOD,
Petitioner.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITIONER'S REPLY BRIEF

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September 26, 1977

REPLY BRIEF

The Penn Central brief would rewrite the Court of Appeals decision six months after the event. The brief imaginatively suggests why the Court of Appeals *might* have issued summary threshold dismissal – not jurisdictional grounds but approaches which do not emanate from (and probably never occurred to) that court. It will not do.

(a) The petitioner and the Supreme Court are entitled to know the court's legal grounds from a reasoned statement of the Court of Appeals itself – as *the indispensable basis of informed judicial review* and as responsible findings of an accountable tribunal. *United States v. Merz*, 376 U.S. 192, 199 (1964).

(b) The Court of Appeals must have reached any valid decision by fair procedure without entrapment.

"Fairness of procedure is due process in the primary sense." *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 161 (1951), citing *Brinckerhoff-Faris*, see Petition 12, 17.

(c) A party is entitled to be *heard* before decision on a new theory. *Phillips v. Crown Central Petroleum Corp.*, 556 F.2d 702, 705 (C.A. 4, 1977).

Was there an appealable 1974 judgment of the district court? It is a question of procedural regularity. Civil Rule 58 as amended rules out guesswork and applies in this case. *Matter of Morales*, 553 F.2d 1192 (C.A. 9, 1977)

A. The court's indispensable reasoned statement of legal grounds for dismissal is totally lacking

The defect extends to every question presented below. Compare the questions (Q.1 through Q.8 appended to Wolfe brief) with the court's orders (Petition 2a-8a).

Q.1-5 *On holding the expense fund to protect the stockholders from fiduciary breach by the Penn Central trustees.* The court summarily dismissed the questions for lack of substance, without explanation. See Wolfe brief 5, Petition 13 note 2.

Q.6 *On prior claims for allowances* (pending or inchoate). The court dismissed, then recanted – but adhered to summary dismissal of the pending unadjudicated success claims, shifting from one reason to another, finally stating that no injustice was being done. (Petition 8-13.)

Q.7 *On Penn Central's agreement not to molest the fund.* The court summarily dismissed *sub silentio.*[1]

Q.8 *On referral to a special master.* The court summarily dismissed *sub silentio.*

B. Every ground of dismissal asserted by the Court of Appeals is improper.

1. *There was no 1974 appealable order.* The Penn Central brief admits (p. 4) that the district court's order for 1974 hearing on allowances omitted Mr. Rood's pending petitions. Only the district court could adjudicate his

[1] The Penn Central brief errs (p. 8 note 9) in denying agreement for petitioner Rood's claims to lie in abeyance. See the Hally letter (Petition 11a). Question 7 below referred to broader agreement of the PC trustees not to disturb the fund, in consideration of Mr. Rood's waiving his rights against another fund. PC Washington counsel did not participate in that agreement or in the long negotiations to settle.

petitions. It has not done so. (There have been long negotiations.) The last court order on his petitions for allowance came in June 1973, when Judge Ford (the B&P reorganization judge until 1974) issued a special order (which Penn Central opposed) referring Mr. Rood's 1973 Second Supplemental Petition for a success allowance to the I.C.C. for its recommendation (which is no longer needed).[2] The district court has not adjudicated any petition of Mr. Rood for an allowance since 1969.

No profert of an order of adjudication has ever been made. No such order has been exhibited to (or by) the Court of Appeals.

2. *The courts knew that there was no appealable order.*

(a) The district court had judicial knowledge of its own record in the proceeding.

(b) In the 1974 appeal the Court of Appeals described Mr. Rood's pending petitions for allowances, including his 1971 petition for $150,000 and his Second Supplemental (success) Petition for $453,000.[3] *In re B&P,* 501 F.2d 545, 547 (July 17, 1974, clarified by memorandum October 18).

[2] The I.C.C. purported to "dismiss" the petition summarily, at Penn Central's request. That is one of the legal errors shown in Mr. Rood's pending objections of 1974 to the district court. Only Judge Ford could dismiss the petition legally.

Today he would refer it to one of the panel of special masters of the district court for railroad reorganization problems.

[3] Calculated as 5 per cent of the 1973 B&P Stage Two realization of $12,000,000 – less $147,000 interim compensation allowed to Mr. Rood and his colleagues in 1969.

(c) At the 1976 hearing before Judge Caffrey, Mr. Rood said:

> "I am glad Mr. Bartlett [the B&P trustee] is here. Meanwhile, it might be in order – I think it would be in order – for the Court to ask the B&P Trustee, or, if he feels barred by conflicts of interest, then his counsel, Mr. Charles W. Mulcahy, who is fully informed, *to make a report to the Court on what, in their opinion, should be done about our petitions for allowance.* (Hearing, May 3, 1976, Tr. 16, emphasis added.)

(d) In their October 1976 Opposition to Summary dismissal in the Court of Appeals, the Development Group appellants (including Mr. Rood) pointedly argued –

(i) Their reservation of the success factor in their petitions of 1966 and 1971 (pp. 15-16).

(ii) Judge Ford's acceptance of the success reservation (shown by his referral of the 1973 success petition to the I.C.C.).

(iii) The refusal of all tribunals to recognize a success factor when passing upon the petitions of 1966 or 1971 – on the ground that success had not yet materialized and that recognition would be premature.[4]

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[4] Even in 1972 the I.C.C. examiner found the prospects for the B&P sale to Massachusetts very doubtful. I.C.C. F.D. 12131, B&P Reorganization. Report Recommended by Examiner Dodge August 24, 1972, sheet 31.

Mr. Rood's 1969 allowance order recognized 452 weeks of at least 40 hours. The $90,000 award (at 40 hours weekly) came to $4.98 per hour. That *interim* rate did not reflect any success.

(iv) *The pendency of the 1974 Second Supplemental Petition for allowance in the district court* (p. 17).

All of this was argued in light of

(v) The equity standard of allowances. *Sprague v. Ticonic National Bank,* 307 U.S. 161 (1939) and on remand 110 F.2d 714 (C.A. 1, 1940). See Dawson: *Lawyers and Involuntary Clients: Attorney Fees from Funds,* 87 Harv. L. Rev. 1597, 1609 ff, 1653 (June 1974).

(vi) The right to a hearing on final allowances. The law of equitable reorganization allowances requires such an opportunity. Only at the end of the proceedings can the court appraise the actual success and benefits and award compensation accordingly. Until then allowances are only *interim* – provisional and tentative. See *6A Collier on Bankruptcy* (14th ed.) ¶13.16, p. 1009. The parties herein await the final call for petitions for allowances.

C. Petitioner Rood did inform the Court of Appeals of the pendency of his success petition, in the Opposition to Summary Dismissal, October 25, 1976, before the Court's first order.

See this statement in his October Opposition:

> "*The second supplemental petition* of Mr. Rood followed the realization of the proceeds from the grand B&P sale to Massachusetts. It was filed in June, 1973. Judge Ford accepted it and forwarded it to the Commission.
>
> "The Commission has not heard it. This petition is founded on the *Ticonic* case." (p. 17)

D. In dismissing the appeal for supposed lack of the above statement the Court of Appeals victimized petitioner Rood by again misreading the record

Every ground asserted for summary dismissal proves unfounded.

1. There was no 1974 judgment on Mr. Rood's petitions.

2. He could not have appealed without a judgment, under Civil Rule 58.

3. He did not waive his claims by not appealing from the unappealable.

4. He should not be penalized by forfeiture for not anticipatorily saving the court from unforeseeable *sua sponte* errors.

5. He did inform the court that his petition for success allowance was pending, before the court issued its first ruling.

6. Mr. Rood fully complied with First Circuit Rule 15, carefully explaining that he could not have anticipated the Court's first misreading. His pleadings were all timely under the Appellate Rules.

7. The Court's final ground, that no injustice is being done, is no sufficient ground. It only begs the question of propriety and refuses to disturb an irregularly reached *status quo* of summarily dismissal.

E. The lack of a reasoned statement of grounds is a deprivation of due process

When a court reaches a decision on erroneous factual bases, and then precludes the victim from being heard in order to correct those errors, it withholds procedural due process in an aggravated manner.

It frustrates petitioner Rood from obtaining a sufficiently informed Supreme Court decision of the certiorari question now pending.

The Court of Appeals held petitioner to an impossible standard of "clairvoyant anticipation". *Halpern v. Schwartz*, 426 F.2d 102, 105 (C.A. 2, 1970). *Williams v. Ward*, 556 F.2d 1143, 1154 (C.A. 2, 1977). Even if formal findings of fact are not mandatory, some reasonable explanation is necessary. *Huckeby v. Frozen Food Express*, 555 F.2d 542, 545 (C.A. 5, 1977).

It is error to decide on a new ground without first giving the parties an opportunity to be heard. *British Airways Board v. Port Authority of New York*, 558 F.2d 75, 82 (C.A. 2, 1977); *Olivares v. Martin*, 555 F.2d 1112, 1196 (C.A. 5, 1977); *Fruges Heirs v. Blood Service*, 506 F.2d 841, 844 note 2 (C.A. 5, 1975) thus –

> "The underlying assumption of this proposition is, of course, that the parties had a full and fair opportunity to develop facts relevant to the decision. Where this opportunity has not been available, the proper resolution of the appeal is not affirmance but remand."

Cf. *Fountain v. Filson*, 336 U.S. 681, 683 (1949).

Battle fatigue with reorganization does not warrant rationing justice or countenancing procedural irregularity extending to the extreme of deciding without hearing – setting up shielded propositions advanced by the court in its dispositive order before counsel had a chance to test and challenge them in the traditional adversary way. *Sears Roebuck & Co. v. General Services Admin.*, 553 F.2d 1378, 1382-3 (C.A.D.C., 1977).

But the First Circuit is no stranger to honorable amends. *Cochran v. M. & M. Trans. Co.*, 110 F.2d 519, 523 (C.A. 1, 1940).

F. Timeliness

Timeliness is not jurisdictional. The Clerk properly received the Petition on July 2 under Mr. Justice Brennan's order extending the time until July 24. His extension was discretionary. *Durham v. United States*, 401 U.S. 481 (1971); *Taglionetti v. United States*, 394 U.S. 316 (1969).

The imperial Penn Central Wreck is our most shocking financial disaster. As its undertakers and their established lawyers contemplate its ruin, they would do well to stop opposing procedural due process for little B&P. Their turn will come. The B&P Development Group has honorably saved one row in the devastated vineyards. Will they do as well?

CONCLUSION

The Supreme Court should remand the proceeding to the Court of Appeals –

either for

(1) a detailed statement of grounds for its decision (if the lower court believes that the supporting facts are adequate and the decision one to which it will otherwise adhere),

or (2) for reconsideration,

or (3) for plenary argument upon withdrawal of the present summary dismissal.

Respectfully submitted,

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